TESTIMONY
OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE AFFAIRS
ON
INDIAN LANDS:
EXPLORING RESOLUTIONS TO DISPUTES CONCERNING INDIAN TRIBES, STATE AND LOCAL GOVERNMENTS, AND PRIVATE LANDOWNERS OVER LAND USE AND DEVELOPMENT

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Chairman Young, Ranking Member Lujan, and Members of the Subcommittee, my name is Michael Black and I am the Director of the Bureau of Indian Affairs (BIA). Thank you for the opportunity to present the statement of the Department of the Interior (Department) for this oversight hearing titled "Indian lands: Exploring Resolutions to Disputes Concerning Indian Tribes, State and Local Governments, and Private Landowners Over Land Use and Development."

In the Subcommittee's invitation to the Department, the Subcommittee posed several questions on two specific issues. First, the Subcommittee would like the Department to address the issue of the Department's rules and procedures for taking lands in trust when local governments or private landowners oppose the jurisdictional changes that occur when the federal government acquires land. Second, the Subcommittee asked the Department to address the issue of the land status at the former military base at Fort Wingate in New Mexico.

Purposes of the Indian Reorganization Act

Section 5 of the Indian Reorganization Act of 1934 expressly authorizes the Secretary to acquire land in trust for Indians "within or without existing reservations."

In 1887, Congress passed the General Allotment Act. The General Allotment Act divided tribal land into 80 and 160-acre parcels for individual tribal members. The allotments to individuals were to be held in trust for the Indian owners for no more than 25 years, after which the owner would hold fee title to the land. So-called "surplus lands," that is, those lands that were not allotted to individual members, were taken out of tribal ownership and conveyed to non-Indians. Moreover, many of the allotments provided to Indian owners fell out of Indian ownership through tax foreclosures.

The General Allotment Act resulted in an enormous loss of tribally owned lands, and is responsible for the current "checkerboard" pattern of ownership and jurisdiction on many Indian reservations. Approximately 2/3 of tribal lands were lost as a result of the land divestment policies established by the General Allotment Act and diverse homestead acts. Moreover, prior

to the passage of the General Allotment Act, many tribes faced a steady erosion of their land base during the removal period of federal Indian policy.

The Secretary of the Interior's Annual Report for fiscal year ending June 30, 1938, reported that Indian-owned lands had been diminished from 130 million acres in 1887, to only 49 million acres by 1933. Much of the remaining Indian-owned land was "waste and desert." According to Commissioner of Indian Affairs John Collier in 1934, tribes had lost 80 percent of the value of their land during this period, and individual Indians realized a loss of 85 percent of their land value.

Congress enacted the Indian Reorganization Act in 1934, in light of the devastating effects on Indian tribes of its prior policies. Congress's intent in enacting the Indian Reorganization Act was three-fold: to halt the federal policy of allotment and assimilation; to reverse the negative impact of allotment policies; and to secure for all Indian tribes a land base on which to engage in economic development and self-determination.

The first section of the Indian Reorganization Act expressly discontinued the allotment of Indian lands, while the next section preserved the trust status of Indian lands. In section 3, Congress authorized the Secretary to restore tribal ownership of the remaining "surplus" lands on Indian reservations. Most importantly, Congress authorized the Secretary to secure homelands for Indian tribes by acquiring land to be held in trust for Indian tribes under section 5. That section has been called "the capstone of the land-related provisions of the [Indian Reorganization Act]." Cohen's Handbook of Federal Indian Law § 15.07[1][a] (2005). The Indian Reorganization Act also authorized the Secretary to designate new reservations.

The United States Supreme Court recognized that the Indian Reorganization Act's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Congress recognized that one of the key factors for tribes in developing and maintaining their economic and political strength lay in the protection of each tribe's land base.

Acquisition of land in trust is essential to tribal self-determination. The current federal policy of tribal self-determination built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act**.** This Administration has sought to live up to the standards Congress established eight decades ago, through the protection and restoration of tribal homelands.

Most tribes lack an adequate tax base to generate government revenues, and others have few opportunities for economic development. Trust acquisition of land provides a number of economic development opportunities for tribes and helps generate revenues for public purposes.

For example, trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from the tribal government to bolster local housing markets and off-set high unemployment rates. Trust acquisitions are necessary for tribes to realize the tremendous energy development capacity that exists on their lands. Trust acquisitions also allow tribes to grant certain rights-of-

way and enter into leases necessary for tribes to negotiate the use and sale of their natural resources. Additionally, trust lands provide the greatest protections for many communities who rely on subsistence hunting and agriculture that are important elements of their culture and life ways.

The Department of the Interior's Fee-to-Trust Regulations

When the Department acquires land in trust for tribes and individual Indians under the Indian Reorganization Act, the Secretary applies his discretion after consideration of the criteria for trust acquisitions in the Department's regulations at 25 C.F.R. Part 151 (151 Regulations), unless Congress mandates that the Department acquire the land in trust. These regulations have been in place since 1980, and have established a clear and consistent process for evaluating fee-to-trust applications that consider the interests of all affected parties.

The 151 Regulations establish criteria for trust acquisitions. The Secretary must consider additional criteria in acquiring land that is outside of a tribe's existing reservation, rather than within, or contiguous to, its existing reservation. Taking land into trust is an important decision, not only for the Indian tribe seeking the determination, but for the local community where the land is located. The transfer of land from fee land title to trust status may have tax and jurisdictional consequences that must be considered before a discretionary trust acquisition is completed.

The Part 151 process is initiated when a tribe or individual Indian submits a request to the Department to have land acquired in trust on its behalf. The regulations require that an applicant submit a written request describing the land to be acquired and other information. Once a request arrives at the BIA agency or regional office, it is entered into the BIA's Fee-to-Trust Tracking System. The request is reviewed to determine whether all information has been submitted and whether there are additional steps needed to complete the application. The BIA works with the applicant to complete the application.

The regulations require that an application for fee-to-trust contain the following:

- a written request stating that the application is requesting approval of a trust acquisition by the United States of America for their benefit;
- identification of applicant(s);
- a legal land description;
- the need for acquisition of the property;
- purpose for which the property is to be used; and
- a legal instrument such as a deed to verify applicant's ownership.

In addition, Tribal applicants will also submit the following:

- Tribal name as it appears in the Federal Register;
- statutory authority; and,
- if the property is off-reservation, the applicant will also include a business plan and location of the subject property relative state and reservation boundaries.

An individual Indian applicant is also required to submit the following: Evidence of eligible Indian status, amount of trust or restricted Indian land already owned by the applicant, and information or statement from the applicant addressing the degree to which the applicant needs assistance in handling their affairs.

The BIA must take several internal steps necessary to assess the application. These include determining whether the land is located within, or contiguous to, the applicant's existing reservation, and whether the trust acquisition is mandated by existing law or falls within the Secretary for the Department of the Interior's discretion to take lands into trust. We also determine whether the applicant already has an undivided fractional trust or restricted interest in the land it is requesting to have placed into trust, and how much trust or restricted land the applicant has an interest in overall. We assess whether the land is already under the tribe's jurisdiction and, if not, whether there are any anticipated additional responsibilities the BIA would assume if the fee land were taken into trust. We may also determine whether the property lies within the Indian tribe's approved Land Consolidation Plan.

The BIA requires additional information where a tribe seeks to have land acquired in trust outside of its existing reservation. The BIA will request a business plan if the land is to be used for economic development. If the land is within the reservation of another Indian tribe, the applicant must receive written consent from the other Indian tribe's governing body if the applicant does not already own a fractional trust or restricted fee interest in the property to be acquired. If the land is off-reservation, we examine the proximity to the applicant's other trust or restricted land.

Once an applicant has submitted sufficient information, the BIA sends out notification letters to the state, county, and municipal governments having regulatory jurisdiction over the land, with a request to respond within thirty (30) days with a description of the acquisition's potential impacts to regulatory jurisdiction, real property taxes and special assessments. Prior to making a decision on every discretionary acquisition, the Department evaluates the application pursuant to each of the factors identified in the regulations at 25 CFR § 151.10 (on-reservation) and 25 C.F.R. § 151.11 (off-reservation). The wealth of a tribe or individual is not a consideration when evaluating the need for additional land. One of the eight (8) factors considered is the need of the applicant tribe for additional land, but the wealth or lack thereof is not one of the factors for consideration.

The BIA must also comply with the requirements of the National Environmental Policy Act (NEPA) and Departmental environmental review requirements in making its determination. The NEPA requires the BIA to disclose and analyze potential environmental impacts of taking land in trust and affords the public an opportunity to review and provide comments on those impacts.

If the Secretary decides to acquire land once this process is completed, the BIA prepares for publication a "Notice of Decision" to take the land into trust for publication. At this point, any governmental entity or individual with standing who objects to the decision to take the land into trust may file an administrative appeal or challenge the decision in district court, as appropriate.

Consequences of the *Carcieri* and *Patchak* Decisions

In *Carcieri*, the Supreme Court addressed the question of whether the Department could acquire land in trust on behalf of the Narragansett Tribe of Rhode Island for a housing project under section 5 of the Indian Reorganization Act. The Court's majority noted that section 5 permits the Secretary to acquire land in trust for federally recognized tribes that were "under federal jurisdiction" in 1934. It then determined that the Secretary was precluded from taking land into trust for the Narragansett Tribe, which had not asserted that it was "under federal jurisdiction" in 1934.

The decision upset the settled expectations of both the Department and Indian Country, and led to confusion about the scope of the Secretary's authority to acquire land in trust for *all* federally recognized tribes – including those tribes that were federally recognized or restored after the enactment of the Indian Reorganization Act. Many tribal leaders have noted that the *Carcieri* decision is contrary to existing congressional policy, and has the potential to subject some federally recognized tribes to unequal treatment under federal law.

Following the *Carcieri* decision, the Department must examine whether each tribe seeking to have land acquired in trust under section 5 of the Indian Reorganization Act was "under federal jurisdiction" in 1934. Without congressional action to clarify the Secretary's trust acquisition authority under the Indian Reorganization Act, the Department undertakes this analysis on a tribe-by-tribe basis for each tribe applying to have land acquired in trust. We have seen that this analysis can be both time-consuming and costly, and it has dramatically slowed the Department's consideration of a number of fee-to-trust applications.

More recently, the Supreme Court decided *Salazar v. Patchak*, 132 S. Ct. 2199 (2012), which has raised a number questions regarding judicial review of the Department's fee-to-trust process after land is acquired in trust for tribes. The Department is in the process of evaluating the impact of the decision.

Fort Wingate Property

The Fort Wingate property is an inactive U.S. Army installation located in New Mexico on lands withdrawn from the public domain and reserved for military use when the fort was established in 1870. The property is located east of Gallup, New Mexico, and near both the Pueblo of Zuni and Navajo Nation lands in New Mexico. The installation's primary mission had been to store and dispose of explosives and military munitions. Fort Wingate closed in 1993, as a result of the Base Realignment and Closure (BRAC) Act. Following the closure, a survey determined that the installation contained approximately 20,700 acres of public domain lands, which are divided into 22 parcels. These lands have cultural and historical significance to the Navajo Nation and the Pueblo of Zuni.

The Department of the Interior indicated that many of the parcels could be returned to its jurisdiction, upon satisfactory completion of environmental restoration and clearance of unexploded ordnance, with the intent of eventually transferring the lands into trust for the Navajo Nation and Pueblo of Zuni, upon agreement by the two tribes. Since 1990, the Army has been

working with the Department, the U.S. Environmental Protection Agency, the New Mexico Environmental Department, the Navajo Nation, and the Pueblo of Zuni on the cleanup and return of withdrawn public domain lands at Fort Wingate. (Four parcels – 2, 3, 19, and 20 – are not included in current U.S. Army relinquishment efforts due to active munitions and use by the Missile Defense Agency.)

Once the Army satisfactorily finishes environmental restoration activities on Fort Wingate parcels and an Environmental Site Assessment is prepared, the Department of the Interior determines if the lands are suitable for return to the public domain. If suitable, the Department will revoke the military reservation and may transfer jurisdiction and management of the parcels to the BIA. The next intended step, placing the lands into trust status for the benefit of specific tribes, requires Congressional action.

The Bureau of Land Management (BLM) has responsibility for processing withdrawal and transfer actions, including preparing the public land orders officially transferring jurisdiction over restored Fort Wingate lands to the BIA. To date, the BLM has prepared public land orders, signed by the Assistant Secretary and Deputy Secretary, officially transferring 5,429 acres (Parcels 1, 15, and 17) of Fort Wingate lands. Those parcels are currently administered by the BIA and are primarily wilderness areas.

Currently, the BIA is overseeing preparation of an Environmental Site Assessment on four parcels (4B, 5B, 8, and 25) comprising 1,103 acres (a fifth parcel, 10A, may be added). When the assessment is completed, the BIA will notify the BLM of the suitability of the lands for transfer into BIA management. If appropriate, as in 2000 and 2001, the BLM will prepare a public land order officially ending the military reservation for the parcels and transfer management to the BIA.

Conclusion

The power to acquire lands in trust is an important tool for the United States to effectuate its longstanding policy of fostering tribal-self determination. Congress has worked to foster self-determination for all tribes, and did not intend to limit this essential tool to only one class of tribes. The Department takes seriously its authority and responsibility to consider applications to acquire land in trust on behalf of tribes and individual Indians. These types of acquisitions are one of the most solemn responsibilities the Department has, in carrying out the nation-to-nation relationship with Indian tribes.

We also take seriously our responsibility to afford an opportunity to interested parties to comment on fee-to-trust applications pursuant to our regulations. The Department's process has been in place for more than 30 years, and has provided clear guidance and consistent opportunities for applicant tribes and other interested parties to participate in this process.

As sponsor of the Indian Reorganization Act, Congressman Howard, stated: "[w]hether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a forum of legalized misappropriations of the Indian estate, the Government

became morally responsible for the damage that has resulted to the Indians from its faithless guardianship."

We will continue to work with Members of this Subcommittee to clarify and reaffirm the Secretary's authority to acquire land in trust on behalf of all tribes, and to discharge our responsibilities in accordance with the law and our regulations.

This concludes my prepared statement. I will be happy to answer any questions the Subcommittee may have.